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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 267

UNITED STATES OF AMERICA, PETITIONER

v.

NEIFERT-WHITE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the United States District Court for the District of Montana (J.A. 25) is reported at 247 F. Supp. 878. The opinion of the United States Court of Appeals for the Ninth Circuit (J.A. 33) is reported at 372 F. 2d 372.

JURISDICTION

The judgment of the court of appeals (J.A. 43) was entered on January 20, 1967. By order of Mr. Justice Douglas, the time for filing a petition for a writ of certiorari was extended to and including June 19, 1967. The petition for a writ of certiorari was filed on June 19, 1967, and granted on October 9, 1967. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**QUESTION PRESENTED**

• Whether the False Claims Act applies to a false and fraudulent application for a federal loan which results in the disbursement of federal funds to which the applicant is not entitled.

**STATUTES INVOLVED**

The False Claims Act provides in pertinent part:

**R.S. § 3490 (1878):**

Any person not in the military or naval forces of the United States \* \* \* who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four, hundred and thirty-eight, Title "CRIMES," shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing of such act \* \* \*.

**R.S. § 5438 (1878):**

Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to

contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, \* \* \* shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars.<sup>1</sup>

#### STATEMENT

This action was instituted by the United States against the respondent, Neifert-White Company, to recover statutory forfeitures under the False Claims Act, 31 U.S.C. 231. The facts are as follows:<sup>2</sup>

The Commodity Credit Corporation (CCC) was authorized by the Commodity Credit Corporation Charter Act of 1948 to "make loans to grain growers needing storage facilities when such growers shall apply to the Corporation for financing the construction or purchase of suitable storage \* \* \*." 15 U.S.C. 714b(h).<sup>3</sup> Acting under its general authority to adopt

<sup>1</sup> The civil portion of the False Claims Act has been codified at 31 U.S.C. 231. The criminal portion has been altered (see 18 U.S.C. 287, 1001), but R.S. § 3490 incorporates, unchanged, the criminal provisions as set out in R.S. § 5438. *Rainwater v. United*, 356 U.S. 590, 592-593.

<sup>2</sup> Since the complaint was dismissed for the failure to state a claim upon which relief could be granted, for present purposes the facts are undisputed.

<sup>3</sup> The Commodity Credit Corporation is "an agency and instrumentality of the United States, within the Department of Agriculture \* \* \*" (15 U.S.C. 714) and within the meaning of the False Claims Act, see *Rainwater v. United States*, 356 U.S. 590, 591-592.

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"regulations governing the manner in which \* \* \* the powers vested in it may be exercised" (15 U.S.C. 714b(d)), the CCC has provided for the granting of farm storage facility loans in amounts not exceeding 80 percent of the actual purchase price of the storage bins, 23 F.R. 9687. To facilitate the enforcement of this limitation, the regulations require that the grain grower's loan application be accompanied by an invoice showing the actual cost of the storage bins and the amount of the down payment made by him (*ibid*).

Respondent is a dealer in grain storage bins. In selling bins, in 1959, to twelve grain farmers, one of its officers prepared invoices in which the purchase price was deliberately overstated. This was done in order fraudulently to induce the CCC to extend loans to respondent's customers in amounts in excess of the 80 percent limitation. The invoices were submitted to the CCC together with the loan applications, and the agency relied upon them in determining the amount of the loans to be extended (J.A. 2-15).

The United States thereafter brought this suit under the False Claims Act to recover the forfeitures authorized by that statute with respect to those who, "for the purpose of \* \* \* aiding to obtain the payment or approval" of a "false, fictitious, or fraudulent" claim against the United States, knowingly cause "to be made or used, any false bill, receipt, voucher \* \* \*." On respondent's motion, the action was dismissed by the district court on the ground that an application for a CCC loan is not a "claim" within the meaning of the Act (J.A. 27). The court of appeals affirmed.

## SUMMARY OF ARGUMENT

This Court has recognized that in enacting the False Claims Act the purpose of Congress was "broadly to protect the funds and property of the Government from fraudulent claims." *Rainwater v. United States*, 356 U.S. 590, 592. The court below, however, construed the Act as applying only to those situations in which the claim involves the assertion of a legal right against the government, and not to loan applications and other claims which are addressed to the discretion of the governmental agency involved.

This view would in large measure frustrate Congress' purpose to protect the public treasury. It is of no practical consequence whether the funds are disbursed as a result of a fraudulent claim of right or on the basis of a fraudulent application for a loan; in either instance the government runs a serious risk of loss if the fraud is not uncovered.

Nor does the statutory language require that result. In referring to "any claim upon or against the Government", Congress showed that it did not intend the coverage of the Act to be limited to a particular type of claim. Similarly, the reference to "the payment or allowance" of a claim, suggests that the term "claim" embraces situations involving a discretionary disbursement of government funds.

This Court's decisions also support the conclusion that the term "claim" refers to any application that results in the disbursement of government funds or the distribution of government property. Thus, it has held that "claims" are not limited to matters involving a right that could be legally enforced against the

government. *United States ex rel. Marcus v. Hess*, 317 U.S. 537.

*United States v. Cohn*, 270 U.S. 339, which the court below viewed as compelling the conclusion that "claim" is limited to an assertion of a legal right, does not require that result. *Cohn*, which involved a false application to obtain the release of non-dutiable merchandise from the custody of the customs authorities, stands only for the proposition that for there to be a "claim upon or against the Government" the claimant must be seeking to obtain either funds or property which actually belong to the government.

#### ARGUMENT

##### **AN APPLICATION FOR A LOAN IS A "CLAIM" WITHIN THE MEANING OF THE FALSE CLAIMS ACT**

The single issue presented by this case is whether an application for a loan may constitute a "claim upon or against the Government" within the meaning of the False Claims Act. While this issue has never been expressly considered by this Court, the Court has recognized that, in enacting the False Claims Act, "the objective of Congress was broadly to protect the funds and property of the Government from fraudulent claims, regardless of the particular form, or function, of the government instrumentality upon which such claims were made" and that "[b]y any ordinary standard the language of the Act is certainly comprehensive enough to achieve that purpose." *Rainwater v. United States*, 356 U.S. 590, 592.

The court below held, however, that the only false claims covered by the Act are those based upon "as-

sertions of legal rights against the Government," and that since "there was no legal obligation on the part of the United States to approve the grain growers' applications for loans", the frauds committed by the respondent here were not actionable (J.A. 35, 42).

We believe that the distinction drawn by the court below—one which makes the incidence of the Act depend upon whether the government agency's obligation to disburse funds is mandatory or discretionary—is out of keeping with the statutory purpose and not required by the statutory language. We also submit that the relevant authority supports the conclusion that the term "claim" includes all applications which seek the disbursement of government funds or the distribution of government property.

Our construction is certainly in accord with Congress' broad objective, as shown by the legislative history of the Act, to stop the "plundering of the public treasury." *United States v. McNinch*, 356 U.S. 595, 599. The False Claims Act was passed in 1863, 12 Stat. 696, as a result of congressional investigations<sup>4</sup> which had disclosed "defrauding and plundering"<sup>5</sup> of the United States in connection with the expenditure of government funds to support the Civil War effort. While those hearings and debates contain no mention of a distinction between "legal right" and other types of claims, it is clear that what concerned

<sup>4</sup> The report of the investigating House committee, and the testimony which it heard, are found in H. Rep. No. 2, Parts 1 and 2, 37th Cong., 2d Sess.

<sup>5</sup> Remarks of Senator Howard, the Floor manager of the Act, Cong. Globe, 37th Cong., 3d Sess. at 955. The entire debate is at pp. 952-958.

Congress was the financial loss to the government because of fraud. It is obvious the Treasury may be as seriously depleted by fraudulent loan applications as by overstated contract claims. As this Court stated in a slightly different context in *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 544, "These funds are as much in need of protection from fraudulent claims as any other federal money, and the statute does not make the extent of their safeguard depend upon the bookkeeping devices used for their distribution."

There is nothing in the language of the Act to deter the Court from giving full effect to the Congressional purpose of preventing the plunder of the public treasury, regardless of the type of funds involved. The critical language is the phrase "any claim upon or against the Government \* \* \*" (R.S. 5438, emphasis supplied). By use of the word "any", Congress drew wide the circle of protection. That it intended the Act to embrace claims which were not based on the assertion of an absolute right is also apparent from the fact that the Act refers to "the payment or *allowance* of any false or fraudulent claim" (emphasis supplied). The concept of "allowance" bears out the view that a "claim" may extend to an application for a discretionary disbursement of government funds.

This conclusion is also convincingly supported by this Court's decision in *United States ex rel. Marcus v. Hess*, 317 U.S. 537. In *Hess* the Court held that the False Claims Act applied to collusive bids submitted to local governmental units to obtain contracts to perform P.W.A. projects where a substantial portion of

the funds to pay the local governments' obligations under the contracts was to be provided by grants in aid from the United States. The contractors argued that "claim", as used in the False Claims Act, "means that the claim must be based upon the Government's own liability to the claimant \* \* \*";<sup>6</sup> that "[i]t is not sufficient under the provisions of R.S. § 5438 that the defendants make or present claims for payment or approval to an officer \* \* \* of the United States" because there must also be a contractual relationship between the United States and the claimant;<sup>7</sup> and that the respondent contractors could not have "sued the Government" had the local governments failed to make payment on the contracts.<sup>8</sup> This Court, however, rejected these arguments, stating (317 U.S. at 544-545):

These provisions [of the False Claims Act], considered together, indicate a purpose to reach any person who knowingly assisted in causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government.

This is a clear ruling that the term "claim" is not limited to situations involving a right that could be legally enforced against the government.

*United States v. McNinch*, 356 U.S. 595, is likewise consistent with the views we urge, although the Court ruled in that instance that the Act did not

<sup>6</sup> Brief for Respondents in No. 173, October Term, 1942, p. 29.

<sup>7</sup> *Id.* at p. 31.

<sup>8</sup> *Id.* at p. 32.

apply to the transaction in question. Again, the Court recognized that the term "claim" was not limited to a claim of right to government money but could be literally construed to embrace any assertion of "a right or privilege to draw upon the Government's credit" (*id.* at 598). *McNinch*, however, involved statements made in applications for credit insurance presented to the Federal Housing Administration. In holding that this application was not a claim, the Court noted (*id.* at 599) :

"[T]he conception of a claim against the government normally connotes a demand for money or for some transfer of public property." *United States v. Tieger*, 234 F. 2d 589, 591. In agreeing to insure a home improvement loan the FHA *disburses no funds nor does it otherwise suffer immediate financial detriment.* \* \* \*

[Emphasis added.] \*

Unlike the applications for credit insurance in *McNinch*, the loan applications in the case at bar clearly call for the disbursement of government funds. The applicants asserted that they had met the requirements of the statute and applicable regulations and that they were, therefore, entitled to receive the fed-

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\* The Court in *McNinch* did not pass on the question that might be raised by a future default on the insured loan, stating:

Since there has been no default here, we need express no view as to whether a lending institution's demand for reimbursement on a defaulted loan originally procured by a fraudulent application would be a "claim" governed by the False Claims Act [*id.* at 599, n. 6].

This question is answered in the affirmative by *United States v. Veneziale*, 268 F. 2d 504 (C.A. 3), and *United States v. Ridglea State Bank*, 357 F. 2d 495, 497 (C.A. 5).

eral funds which were actually disbursed to them as loans.<sup>10</sup>

It is worth noting that two other cases were decided in the same opinion with *McNinch—United States v. Cato Bros., Inc.* and *United States v. Toepleman*. Both of those cases involved false statements contained in loan applications submitted to the Commodity Credit Corporation. Interestingly, the only issue raised in those cases was whether a claim upon the CCC was a claim "upon \* \* \* the Government," an issue decided affirmatively in an identical case decided the same day, *Rainwater v. United States*, 356 U.S. 590. In none of these cases was the issue whether a loan application is a "claim" raised by either the par-

<sup>10</sup> Although the government did concede in the court below that there was no legal obligation on the part of the government to approve the loan applications, an application to the CCC for a loan is an assertion by the applicant that he is entitled to receive the funds because he has complied with the applicable statute and regulations. Moreover, the CCC Charter Act itself contemplates that such loan applications should be granted whenever an applicant qualifies for a loan under the applicable regulations. Thus, the statute, 15 U.S.C. 714b(h), provides:

\* \* \* That to encourage the storage of grain on farms, where it can be stored at the lowest cost, the Corporation shall make loans to grain growers needing storage facilities when such growers shall apply to the Corporation for financing the construction or purchase of suitable storage, and these loans shall be deducted from the proceeds of price support loans or purchase agreements made between the Corporation and the growers. \* \* \* [Emphasis supplied.]

The fact that the application is filed with an administrator rather than in a court and that the administrator has a broad discretion to determine eligibility does not detract from the conclusion that the applicant is asserting a right to participate in the program.

ties or the Court, even though the cases were argued and decided with *McNinch* in which the meaning of the word "claim" was hotly contested. Similarly, in a number of lower court cases raising questions as to the application of the False Claims Act, the parties and the courts have consistently assumed that the term "claim" included an application for a loan. See, e.g., *United States v. Templeton*, 199 F. Supp. 179 (E.D. Tenn.) (Commodity Credit Corporation crop loan application); *United States v. Cherokee Implement Co.*, 216 F. Supp. 374 (N.D. Iowa) (false application for Commodity Credit Corporation equipment loan). See, also, *Sell v. United States*, 336 F. 2d 467 (C.A. 10) (fraudulent application for emergency feed under the Commodity Credit Corporation's emergency feed program).

In deciding that the false applications for government loans in this case were not encompassed by the False Claims Act, the court below relied almost exclusively on the following statement in *United States v. Cohn*, 270 U.S. 339, 345-346:

\* \* \* the provision relating to the payment or approval of a "claim upon or against" the Government relates solely to the payment or approval of a claim for money or property to which a right is asserted against the Government, based upon the Government's own liability to the claimant. \* \* \*

However, when this language is considered in the context of the factual situation involved in *Cohn*, it becomes clear that the case may be readily reconciled with the Court's subsequent rulings.

The *Cohn* case was a criminal prosecution for the submission of false statements in support of an application by an importer to remove certain non-dutiable imported merchandise from a United States customs house. A shipment of cigars had arrived in Chicago from the Philippines and was being held by the collector of customs. The cigars, which were duty-free, were consigned to the defendant Cohn but the bill of lading was being held by a bank pending Cohn's payment of the draft. Cohn obtained possession of the merchandise by falsely representing that the bill of lading had not arrived and by fraudulently inducing certain customs-house brokers to post a bond with the collector guaranteeing the subsequent production of the bill of lading. On these facts this Court assumed that the collector had been wrongly induced to deliver the cigars to the defendant but held that "obtaining the possession of non-dutiable merchandise \* \* \* is not obtaining the approval of a 'claim upon or against' the Government, within the meaning of the statute." 270 U.S. at 345. Since the merchandise was not property owned by the government and no customs duties were imposed upon it, the Court held that there was no "claim against the Government" within the meaning of the Act.

Since Cohn's request for the cigars was based on a claim that he was legally entitled to them, the Court had no occasion to determine whether there is a distinction between a claim of right and a request for money addressed to the discretion of the disbursing officer. Thus, it seems clear that the language in *Cohn*, quoted above, was addressed solely to the lack of gov-

ernmental interest in the property obtained by the false representation; it had no concern with the question whether the claim involved the assertion of a judicially enforceable right or a request for a discretionary payment. This conclusion is apparent from the Court's comparison of the False Claims Act with the general fraud statute (*id.* at 346-347):

[The False Claims Act] \* \* \* has no words extending the meaning of the word "defrauding" beyond its usual and primary sense. On the contrary it is used in connection with the words "cheating or swindling," indicating that it is to be construed in the manner in which those words are ordinarily used, as relating to *the fraudulent causing of pecuniary or property loss*. And this meaning is emphasized by other provisions in the section in which the word "defraud" is used in reference to the obtaining of money or other property from the Government by false claims, vouchers and the like; and by the *context of the entire section which deals with the wrongful obtaining of money and other property of the Government* \* \* \*. [Emphasis supplied.]<sup>11</sup>

<sup>11</sup> The conclusion is also supported by a reading of the full passage in *Cohn*, from which the language relied on by the court below was taken:

\* \* \* the provision relating to the payment or approval of a "claim upon or against" the Government relates solely to the payment or approval of a claim for money or property to which a right is asserted against the Government, based upon the Government's own liability to the claimant. And obviously it does not include an application for the entry and delivery of non-dutiable merchandise, *as to which no claim is asserted against the Government, to which the Government makes no claim, and which is merely in the temporary possession of an agent of the Government for*

In short, the situation in the instant case is unlike that in *Cohn* and analogous to that in *United States ex rel. Marcus v. Hess, supra*, at 545, where the Court stated:

The situation here is in no sense like that discussed in *United States v. Cohn*, 270 U.S. 339, 345-347, where the government acted solely as bailee and no person had any claim against it for a payment. The Court in the *Cohn* case held that there had been no "wrongful obtaining of money \* \* \* of the government's," while there has been such a "wrongful obtaining" here on claims which were presented either directly or indirectly to the government with full knowledge by the claimants of their fraudulent basis.

*Cohn*, we submit, stands simply for the proposition that there is a "claim upon or against the Government," only if the claimant is seeking to obtain funds or property which actually belong to the government. To read the case (as the court below did) as limiting the term "claim" to "assertions of legal rights against the Government" would lead to absurd results.<sup>12</sup> Thus,

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*delivery to the person who may be entitled to its possession.* This is not the assertion of a "claim upon or against the Government, within the meaning of the statute; and the delivery of the possession is not the "approval" of such a claim [Emphasis supplied.]

<sup>12</sup> It should also be noted that it is not entirely clear what the court below meant by its use of the terms "liability of the government" and "legal obligations." We assume that a tort or contract right which is enforceable in a court of law is a claim of right. However, the adoption of the standard of the court below would raise serious problems of interpretation. Would the "legal obligation" standard embrace a demand for funds founded on a tort for which the United States has not consented to be sued, but for which the United States provides an administrative

a farmer who falsely certifies that he is eligible for both (1) federal price support payments on his crop and (2) a loan to finance the purchase of storage facilities for that crop would violate the False Claims Act in the first case but not in the second. Compare *United States v. Brown*, 274 F. 2d 107 (C.A. 4), with the opinion below (J.A. 33). This disparity would result even though the vice in both cases is identical: the use of false pretenses to obtain federal funds.

Another example of the arbitrary consequences which follow from the court of appeals' construction is provided by *Alperstein v. United States*, 291 F. 2d 455 (C.A. 5), affirming 183 F. Supp. 548 (S.D. Fla.). *Alperstein* involved a veteran who misrepresented his financial status in order to gain free treatment at a veterans Administration hospital for a non-service-connected disability. The court found (183 F. Supp. at 550) that the relevant statute, 38 U.S.C. (1952 ed.) 706, 48 Stat. 525, created a claim of right because it left no discretion to the Veterans Administration in admitting all veterans with non-service-connected disabilities who filed a sworn statement that they could not afford payment, subject only to limitations of space. However, a 1958 amendment to the relevant statute left no doubt that the grant of free medical care for a non-service-connected disability was dis-

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remedy? Similarly, would the standard of the court below embrace a claim for veteran's benefits, where the benefits are created and defined by statute, but the decision whether a veteran qualifies for the benefits is committed to the unreviewable determination by the Veterans Administration? Is the availability of judicial review the *sine qua non* of a legal obligation?

cretionary.<sup>18</sup> Under the Ninth Circuit's reasoning, a fraudulent pre-1958 application for treatment of non-service-connected disabilities would come within the protection of the False Claims Act, but a post-1958 application would not.

In light of the numerous governmental programs authorizing grants or loans, the list of examples might be extended. It suffices to say that the Act's terms do not require such capricious results and that this Court's consistent pronouncements permit uniform application of the statute to all cases in which there is a false application for public funds or property. The overriding purpose of the Act—to protect the federal Treasury—requires no less.

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<sup>18</sup> 38 U.S.C. 610(a), 72 Stat. 1141, provides that the Administrator, within limitations of space, "*may* furnish hospital care which he determines is needed" to a veteran with a non-service-connected disability who is unable to pay. (Emphasis added.)

## CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded to the district court with directions to reinstate the complaint.

Respectfully submitted.

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NOVEMBER 1967.